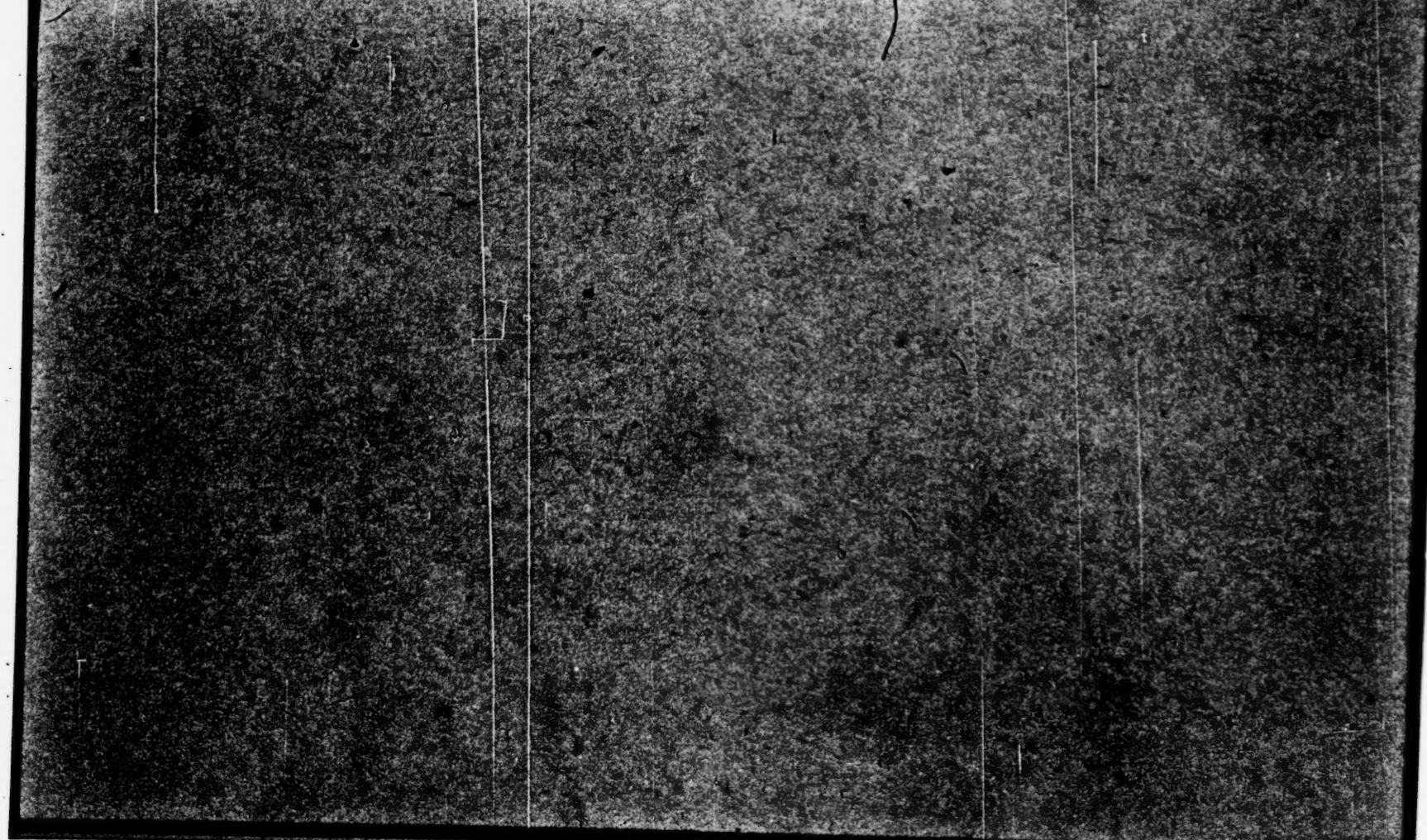

FILE COPY

OCT 12 1933
CHARLES ELMORE CROPLEY

Supreme Court of the United States

October Term, 1933

No. 531

LEO NEBBIA,
Appellant,
against
THE PEOPLE OF THE STATE OF NEW YORK,
Appellees.

STATEMENT AS TO JURISDICTION AND MOTION FOR LEAVE TO FILE

ARTHUR E. SUTHERLAND,
Counsel for the Appellant,
Rochester, N. Y.

JOHN J. BENNETT, JR.,
Attorney-General of the State of New York,
Albany, N. Y.

HENRY EPSTEIN,
Solicitor-General,
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HENRY S. MANLEY,
Counsel to the Department of Agriculture and Markets,
Albany, N. Y.

SMITH O'BRIEN,
Counsel for the Complainant,
Rochester, N. Y.

Supreme Court of the United States

October Term—1933

No.....

LEO NEBBIA,

Appellant,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,

Appellees.

MOTION FOR LEAVE TO FILE STATEMENT AS TO JURISDICTION

MAY IT PLEASE THE COURT:

The undersigned as counsel for appellant, Leo Nebbia, respectfully moves this Honorable Court that the annexed Statement as to Jurisdiction may be received and filed herein and considered by the Court as though annexed to the original petition for leave to appeal.

ARTHUR E. SUTHERLAND,
Counsel for Appellant, Leo Nebbia.

Service of the foregoing is admitted this 30th day of September, 1933.

JOHN J. BENNETT, JR.,
Attorney-General.

HENRY EPSTEIN,
Solicitor-General.

HENRY S. MANLEY,
Counsel to the Department of Agriculture and Markets.

ARTHUR E. SUTHERLAND,
Counsel for the Appellant.

SMITH O'BRIEN,
Counsel for the Complainant.

STATEMENT AS TO JURISDICTION ON APPEAL

The appellant in support of the jurisdiction of this Court to review the above entitled cause respectfully shows:

A

Statutory Provisions Believed to Sustain the Jurisdiction.

The Act of February 13, 1925, Ch. 229, § 1, 43 Stat. 937, Judicial Code, §237 as amended, provides in part:

> "(a) A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, * * * where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution * * * of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error."

The Act of January 31, 1928, Ch. 14, § 1; 45 Stat. 54 substituted appeals for writs of error; and by §2 of that Act as amended April 26, 1928, Ch. 440; 45 Stat. 466, the provisions of law regulating writs of error were made to apply to appeals.

B

The Statute of the State of New York, the Validity of Which Is Involved.

There is here involved the validity of Article 25, Agriculture and Markets Law of New York, §§300-319; being Chapter 158 of the Laws of 1933; sometimes called the Milk Control Law.

The Statute is long and complex, but its pertinent provisions may be briefly summarized.

A Milk Control Board of three members is created (§302). This Board must fix by order the minimum wholesale and

retail prices of milk handled in New York for fluid consumption (§312). The rules of the Board are to have the force of law (§304). A sale in violation is punishable by a year's imprisonment, a hundred dollars' fine, or both (§307). The Act is recited to be passed to aid in an emergency (§300) and will expire by its terms on March 31, 1934.

C

The Date of the Judgment Below, and the Date of Presentation of the Application for Appeal.

The New York Court of Appeals gave the judgment appealed from on July 11, 1933. (Original Record, page 78.) The application for appeal was presented to the Chief Judge of the Court of Appeals on August 31, 1933, and the order allowing appeal on that day by him granted. (Original Record, page 35.)

D

Nature of the Case and Ruling Below.

This case originated with an Information in City Court, Rochester, New York, charging the appellant Nebbia with a violation of the Milk Control Law of New York (§312-E, Agriculture and Markets Law of New York; Ch. 158 N. Y. Laws 1933) in that Nebbia sold milk for less than nine cents per quart, the minimum price fixed by order of the Milk Control Board. (Original Record, page 3.) Nebbia duly raised the question of the invalidity of the statute and order as being in conflict with the Fourteenth Amendment to the Federal Constitution, and was overruled by the City Court, convicted, and fined. (Original Record, page 51.) He then appealed to Monroe County Court, where his conviction was affirmed. He then appealed to the New York Court of Appeals, where his conviction was again affirmed,

with a prevailing opinion by Chief Judge Pound, and a dissenting opinion by Judge O'Brien (Original Record, pages 59-77). The Court of Appeals is the highest court of the State of New York in which a decision herein could be had. In each court the defendant Nebbia urged the invalidity of the Statute and the Order of the Milk Control Board thereunder as in conflict with the Fourteenth Amendment of the United States Constitution; and in each this contention was overruled.

E

Case Sustaining Jurisdiction.

Fairmont Creamery Company v. State of Minnesota (1926), 274 U. S. 1; 71 L. Ed. 893.

It is respectfully submitted that this court has jurisdiction herein by virtue of §237, Judicial Code.

ARTHUR E. SUTHERLAND,
Counsel for Appellant.

To:

THE PEOPLE OF THE STATE OF NEW YORK,
JOHN J. BENNETT, JR.,
Attorney-General of the State of New York,

HENRY S. EPSTEIN,
Solicitor-General;

SMITH O'BRIEN,
Attorney for Complainant,

HENRY S. MANLEY,
Counsel to Milk Control Board.

PLEASE TAKE NOTICE of the provisions of Rule 12-3 of the Rules of the Supreme Court of the United States permitting

the Appellees within fifteen (15) days after service hereof to file with the Clerk of the Court possessed of the record, and serve upon the appellant a typewritten statement disclosing any matter or ground making against the jurisdiction of this court asserted by the appellant. There may be included in or filed with such opposing statement a motion by appellees to dismiss or affirm.

ARTHUR E. SUTHERLAND,
Counsel for Appellant.